SUPREME COURT, U. S.
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In the Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted] 187

A & S TROPICAL, INC.,

Petitioner,

vs.

HIRAM WALKER, INCORPORATED, and SOUTH FLORIDA LIQUOR DISTRIBUTORS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MILTON E. GRUSMARK and
NATALIE BASKIN
Attorneys for Petitioner
1674 Meridian Avenue
Miami Beach, Florida 33139

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Petitioner, A & S TROPICAL, INC., prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered January 31, 1969, and denial of Petition for Rehearing entered March 4, 1969.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit filed January 31, 1969, rehearing denied March 4, 1969, is reported at 407 F. 2d 4. A copy of the opinion is appended to this petition as Appendix A. The decision of the United States District Court for the Southern District of Florida is appended as Appendix B.

The United States Court of Appeals for the Fifth Circuit reversed the decision of the United States District Court for the Southern District of Florida, which had denied Defendant's Motions for summary judgment.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S. Code Section 1254(1) and pursuant to Rule 19 of the rules of the Supreme Court of the United States. Petitioner asserts that the United States Court of Appeals for the Fifth Circuit has rendered a decision on an important question of federal law which has not been but should be settled by this Court, and has decided the federal question in a way in conflict with applicable decisions of this Court.

QUESTION PRESENTED

WHETHER SALES PRICED WITH VOLUME DISCOUNTS ON THE PURCHASE OF ALCOHOLIC BEVERAGES SOLD BY AN OUT-OF-STATE DISTILLER THROUGH A LOCAL DISTRIBUTOR TO RETAIL STORES ARE DISCRIMINATORY SALES IN INTERSTATE COMMERCE WITHIN THE PROHIBITIONS OF THE ROBINSON-PATMAN ACT, 15 UNITED STATES CODE SECTION 13(a).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. Section 13:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available pur-

chasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting the market or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

STATEMENT OF THE CASE

A & S TROPICAL, INC., a retail liquor store doing business in Broward County, Florida, brought an action against HIRAM WALKER, INC., an out-of-state distiller, and SOUTH FLORIDA LIQUOR DISTRIBUTORS, INC., a distributor of alcoholic beverages doing business in south Florida, among others. The Complaint alleged that Defendants engaged in granting quantity discounts in the sale of liquor products to retail competitors of A & S TROPICAL, INC. in violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. Section 13(a). Plaintiff alleged that it was eco-

nomically incapable of purchasing alcoholic beverages in sufficient quantities to qualify for the quantity discounts available to larger chain stores.

Both HIRAM WALKER and SOUTH FLORIDA filed motions for summary judgment on the ground that the allegedly discriminatory sales had not taken place in interstate commerce as required by the Robinson-Patman Act. HIRAM WALKER contended that it had never sold any products directly to A & S TROPICAL, INC.

A & S TROPICAL, INC. contended that certain facts established liability on the part of both HIRAM WALKER and SOUTH FLORIDA under the Robinson-Patman Act. For example, the owner of Pross Liquor Store filed an affidavit stating that he had received rebates on HIRAM WALKER purchases made through SOUTH FLORIDA in the form of free liquor. In his deposition Mr. Pross stated that a HIRAM WALKER missionary man and a SOUTH FLORIDA, INC. salesman came to his store and gave him a discount in the form of extra bottles. He stated that he had to buy at prices higher than those at which other stores were actually selling. He indicated that he was told by SOUTH FLORIDA, INC. that he would receive free liquor. The extra merchandise was brought into his store by the salesman rather than by a SOUTH FLORIDA truck. Free merchandise came to him from HIRAM WALKER'S missionary man who carried it in his car. Mr. Pross stated that small businesses were forced out of business because they could not purchase at the lower prices afforded the larger customer.

SOUTH FLORIDA, INC. was the only wholesaler distributing products sold by HIRAM WALKER in southeast Florida. SOUTH FLORIDA'S general manager, Binford H. Sykes, disclosed that HIRAM WALKER had

three missionary men in the South Florida area, who called on the trade, distributed sales material and interested retailers in promoting products, spending most of their time on merchandising in order to promote the distiller's brand.

Local advertising for HIRAM WALKER was handled from HIRAM WALKER'S Canadian office. Depletion allowances were paid by the distiller to the wholesaler to promote a particular brand. A wholesaler requesting a depletion allowance in order to be able to give a discount to retailers, would be met with a response from the local HIRAM WALKER district man located in Florida.

SOUTH FLORIDA'S purchases depended upon trade requirements. Joe Musick, President and General Sales Manager of HIRAM WALKER confirmed the fact that SOUTH FLORIDA could request a merchandising allowance to aid the point of sale purchase.

HIRAM WALKER supplied merchandising and advertising materials to retailers. Although its main offices are located in Michigan, HIRAM WALKER employs personnel who call on groups and hotels in Florida to promote conventions, and handles advertising for the convention in its home office. Advertising in Florida in magazines is placed by HIRAM WALKER.

The trial court denied Motions for Summary Judgment, on the authority of *United States v. South Florida Asphalt Co.*, 329 F.2d 860 (5th Cir. 1964) Defendants received permission to appeal to the United States Court of Appeals for the Fifth Circuit.

The United States Court of Appeals for the Fifth Circuit reversed the Order entered by the United States District Court for the Southern District of Florida. The appellate court held that the record failed to disclose that HIRAM WALKER ever sold products directly to A & S TROPICAL, INC., or indirectly by controlling the price or terms of resale. The appellate court concluded that HIRAM WALKER could not be held liable as a seller within the meaning of the Robinson-Patman Act. Concerning SOUTH FLORIDA and FLORIDA BEVERAGE as actual sellers, the appellate court held that SOUTH FLORIDA and FLORIDA BEVERAGE sold only to retail customers within the State of Florida and therefore, its sales were not in interstate commerce and not within the scope of the Robinson-Patman Act.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Fifth Circuit reversing the decision of the United States District Court for the Southern District of Florida is of major importance and concern to all retailers of products manufactured in another state. The decision of the appellate court renders small businessmen vulnerable to discriminatory pricing practices formerly thought to have been prohibited by the Robinson-Patman Act.

The enormity of the influence on industry of the decision by the appellate court sought to be reviewed is readily apparent from a realization that many out-of-state manufacturers attempt to comply with the technical requirements of the law in order to defeat the true regulatory intent of the law. Their success is assured under the appellate court's decision.

A. Who is the seller?

Under the interpretation by the appellate court of the Robinson-Patman Act, an out-of-state manufacturer does not sell directly to retail stores even though he engages in certain local activities which benefit those stores. On the other hand, the distributor is immune from regulation of discriminatory prices by virtue of his location in the same state as the purchaser. Nevertheless, the present system requires both a distiller and a distributor to sell the product to retail stores. It is impossible for a retailer to purchase products manufactured outside the state without complying with the system and purchasing from the distributor. It is unrealistic to assert that a sale is not made by the distiller, since the distiller is interested solely in placing its product with retail stores in order to reach the consumer. The consumer is aware that he is purchasing a HIRAM WALKER product rather than a SOUTH FLORIDA product even though the court does not recognize HIRAM WALKER as the seller.

The appellate court recognized that previous decisions provide that if a seller controls the sale he is responsible for discrimination in the sale price, if there is such discrimination. *Purolator Products, Inc. v. F.T.C.*, 352 F.2d 874 (7th Cir. 1965).

The "indirect purchaser" doctrine attempts to prevent a manufacturer, by utilizing a "dummy" wholesaler or distributor, from evading the price discrimination provisions of the Robinson-Patman Act. *American News Company v. F.T.C.*, 300 F.2d 104 (2nd Cir. 1962).

In granting depletion allowances to distributors so that distributors may grant discounts to retailers purchasing in large quantities, the distillers in effect control the ultimate price to the consumer and to the retailer, This is so regardless of statements made that prices were set by SOUTH FLORIDA without consultation with HIRAM WALKER.

Petitioner contends that HIRAM WALKER sells directly in addition to exercising control of the ultimate selling price. It is unrealistic to fail to recognize that HIRAM WALKER'S acts in placing advertising, in sending missionary men to Florida, in granting rebates, in calling on the trade to distribute sales material and to promote products, in educating salesmen are acts constituting direct selling by HIRAM WALKER, INC.

In *American News Company v. F.T.C., supra,* the court pointed out that there need not be privity of contract between the seller and his ultimate buyer to establish the buyer as a "customer" or "purchaser". If the manufacturer deals with a retailer through the intermediary of wholesalers, dealers, or jobbers, the retailer may nevertheless be a customer or purchaser of the manufacturer if the latter deals directly with the retailer and controls the terms upon which he buys, the court said, citing *K. S. Corporation v. Chemstrand Corporation,* D.C.S.D.N.Y. 198 F.Supp. 310; *Champion Spark Plug Company,* 50 FTC 30; *Dentist Supply Company of New York,* 37 FTC 345; *Kraft-Phenix Cheese Corporation,* 25 FTC 557. *Cf. Elizabeth Arden, Inc. v. F.T.C., 2nd Cir.* 156 F.2d 132.

In the case at bar there is testimony indicating that HIRAM WALKER sold its product to a favored retailer through its own salesman as well as with the aid of its distributor. The distributor and the distiller worked together in promoting the product. HIRAM WALKER afforded the distributor depletion allowances in order that it could make discounts. In that manner HIRAM WALKER controlled the price at which its products were sold.

In *Federal Trade Commission v. Sun Oil Company*, 371 U.S. 505, 9 L.Ed. 2d 466, 83 S.Ct. 358 (1963), the Court stated that Congress sought generally to obviate price discrimination practices threatening independent merchants and businessmen presumably from whatever source. The House Committee declared its guiding ideal to be the preservation of equality of opportunity as far as possible to all that are usefully employed in the service of distribution and production. The immediate and generating cause of the Robinson-Patman amendments, the Court said, may have been a congressional reaction to what were believed to be predatory uses of mass purchasing power by chain stores. The Court noted that to permit a competitor's supplier to bring his often superior economic power to bear deprives the otherwise resourceful retailer of the very fruits of his efficiency, and converts the normal competitive struggle between retailers into an unequal contest between one retailer and the combination of another retailer and his supplier. Elements of reasonable and fair competition are thereby eliminated.

The Robinson-Patman Act has been held to prohibit purely local discriminatory activities perpetrated by an interstate manufacturer when the result of these activities may be to substantially lessen competition or to destroy local business. *Moore v. Mead's Fine Bread Company*, 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145 (1954).

In *Jones v. Metzger Dairy, Inc.*, 334 F.2d 919 (5th Cir. 1964), although the court concluded that Jones had failed to establish the existence of any price discrimination and upheld the granting of the motion for summary judgment, the Court quoted "Report of the Attorney General's National Committee to Study the Anti-trust Laws" (1955) in which it was stated:

> "In some circumstances, to be sure, injury to even a single competitor should bring the Act into play. Predatory price cutting designed to eliminate a smaller business rival, for example, is a practice which inevitably frustrates competition by excluding competitors from the market or deliberately impairing their competitive strength. The invalidation of such deliberate price slashes for the purpose of destroying even a single competitor, moreover, accords distinct recognition to the narrower tests of 'injury' added to the price discrimination provisions of the Clayton Act through the 1936 Robinson-Patman amendments. The discrimination provisions in the original Clayton Act were feared by the legislators as inadequate to check the victimization of individual businessmen by predatory price cuts that nevertheless created no general impairment of competitive conditions in a wider market. To reach such destructive price cuts endangering the survival of smaller rivals of a powerful seller was an express objective of the liberalizing amendments in the 'injury' clause of the Robinson-Patman Act."

B. The commerce question.

The decision of the appellate court holding that the alleged sales were not sales in interstate commerce was a decision not in accord with prior decisions of this Court. The appellate court stated in footnote 7 that the fact that a firm manufactures products which are later sold to distributors in another state is not dispositive on the issue of whether a subsequent sale to a retailer is in interstate commerce. In *Walling v. Jacksonville Paper Company*, 317 U.S. 564, 63 S.Ct. 332, 87 L.Ed. 460 (1943), however, the court noted that a situation could arise where shipments made in anticipation of needs of specific customers might be sufficent to establish practical continuity in transit necessary to keep a movement of goods "in commerce". The Court stated:

> " . . . The entry of the goods into the warehouse interrupts but does not necesarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the Act. As in the case of an agency (cf. DeLoach v. Crowley's Inc., (CCA 5th) 128 F.2d 378) if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which contsitutes commerce."

In *Pevely Dairy Company v. United States*, 178 F.2d 363 (8th Cir. 1949), in response to a contention that an interruption of the flow had taken away the "in commerce" nature of a commodity the court relied on the producers' intent to reach the ultimate consumer. See also *Mandeville Island Farms v. American Crystal Sugar Company*, 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328.

In *Foremost Dairies v. F.T.C.*, 348 F.2d 674 (5th Cir. 1965) the court pointed out that the underlying principles in defining the term "in commerce" or "stream of commerce" under the Sherman, Clayton and Robinson-Patman Acts are substantially identical. The court stated that the Robinson-Patman Act applies to all forms of interstate commerce in whatever sense the commerce in question might be considered interstate.

In *American News Company v. F.T.C.*, 300 F.2d 104 (2nd Cir. 1962), the argument that the individual transactions were not in interstate commerce since the interstate shipments of magazines were broken and repacked by the wholesaler before being shipped to the retail outlet was rejected.

The practical continuity theory, that is that substantially all the goods sold in Utah or Idaho were processed and packaged outside those states was approved in *Food Basket, Inc. v. Albertson's Inc.*, 383 F.2d 785 (10th Cir. 1967).

CONCLUSION

In the case at bar HIRAM WALKER received and filled orders for its products in the Florida area exclusively through its distributor, SOUTH FLORIDA, INC. However, it is an obvious fiction to say that HIRAM WALKER does not sell "in commerce" or that SOUTH FLORIDA does not sell "in commerce". HIRAM WALKER intends its products for consumption. HIRAM WALKER sells its products in Florida by direct intrastate and interstate advertising, by employing sales personnel, by merchandising its products, by giving its distributor discounts, enabling the distributor to give discounts to retailers. The distributor, SOUTH FLORIDA, INC. assists the distiller in placing the product in the hands of the consumer, but all these methods are measured against the effectiveness with which the HIRAM WALKER product reaches the consumer. Since HIRAM WALKER is a Delaware Corporation, the sale of its products in Florida is a sale in commerce as were the specific sales questioned in deposition. Although HIRAM WALKER products may be purchased by retailers through the agency of SOUTH FLORIDA, INC., each transaction remains in commerce since the retailer is forced to purchase HIRAM WALKER products in the only way they are available. The product he purchases is a HIRAM WALKER product not a SOUTH FLORIDA product, and coming from out of state, is in commerce.

For the foregoing reasons it is respectfully submitted that this Court should grant Petition for Writ of Certiorari and reverse the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

MILTON E. GRUSMARK and
NATALIE BASKIN
Attorneys for Petitioner
1674 Meridian Avenue
Miami Beach, Florida 33139

By _____
Natalie Baskin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed to Antonio Martinez, Jr., 10th Floor, First National Bank Bldg., Miami, Florida 33131, James C. McKay and George V. Allen, Jr., 701 Union Trust Building, Washington, D. C. 20005, Ward, Ward, Straessley, Hiss & Kluttz, 1240 du-Pont Building, Miami, Florida 33131 and Salley, Barnes, Pajon & LaFontisee, 100 Biscayne Tower, Suite 700, Miami, Florida 33132 this_____day of May, 1969.

_____

Natalie Baskin

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26012

HIRAM WALKER, INCORPORATED, and SOUTH FLORIDA LIQUOR DISTRIBUTORS, INC.,

Appellants,

versus

A & S TROPICAL, INC.,

Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(January 31, 1969)

Before TUTTLE and AINSWORTH, Circuit Judges, and MITCHELL, District Judge.

AINSWORTH, Circuit Judge: Appellee, a retail liquor store doing business in Broward County, Florida, brought this action against Hiram Walker, Inc., South Florida Liquor Distributors, Inc., and the Florida Beverage Corporation for damages and injunctive relief, alleging that defendants engaged in granting quantity discounts in the sale of liquor products to appellee's retail

competitors in violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a):[1]

> "(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . ., and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . . ."[2]

Both Hiram Walker and South Florida moved for summary judgment[3] on the ground that the allegedly discriminatory sales had not taken place in interstate commerce,

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[1]Ten of the original thirteen defendants were either not served with process, or were dismissed from the suit on various grounds. In addition, the original complaint alleged violation of the Sherman Act, but this count was dismissed without prejudice and is not before the Court on this appeal.

[2]The provisos in Section 2(a), relating, inter alia, to the defense of cost of justification, are not necessary to our decision in this case.

[3]Florida Beverage did not file a motion for summary judgment, and thus technically it is an appellee in this appeal. However, the issues raised by appellant South Florida apply with equal force to Florida Beverage; and in its brief, Florida Beverage expressly adopts the positions taken by Hiram Walker and South Florida.

and that, hence, those transactions were not within the scope of the Robinson-Patman Act. In addition, Hiram Walker contended that it should not be held liable as a seller under the Robinson-Patman Act because it had never sold any products directly to appellee. The District Judge denied the motions for summary judgment, but, finding that his order involved "controlling questions of law as to which there is substantial ground for difference of opinion," held "that an immediate appeal from this Order as authorized by 28 U.S.C. § 1292(b) may materially advance the ultimate termination of this litigation. . . ." On March 23, 1968, a panel of this Court granted appellants' application for leave to appeal from the interlocutory order of the District Court. After full consideration of the undisputed facts and the applicable law, we conclude that the District Court erred in denying the appellants' motions for summary judgment.

Appellant Hiram Walker is a manufacturer of alcoholic beverages,[4] which it sells in interstate commerce to wholesale distributors throughout the United States, including South Florida and Florida Beverage Corporation in Florida. The latter distributors store the liquor in warehouses for varying periods of time, and resell it to retail stores in Florida, including appellee. Hiram Walker does not sell directly to retail stores, and it is undisputed that it does not fix the price or establish the terms and conditions of resale. Rather, Hiram Walker's activities are limited to promotional work by "missionary" men who

[4]The term "manufacturer" is employed by us as a matter of convenience. We are admonished by the appellant Hiram Walker that it is in actuality "the exclusive sales agent of an affiliated corporation which manufactures the products sold by Hiram Walker." It is conceded, however, that this fact is without lecal significance in the present context.

provide retailers with advertising materials and generally act to supplement a national advertising effort designed to promote Hiram Walker products. These "missionary" men are not salesmen, and do not take orders for liquor.

The basic purpose of Section 2(a) of the Robinson-Patman Act was to insure that purchasers from a single seller would not be injured by the seller's discriminatory pricing policies. *F.T.C. v. Sun Oil Company*, 371 U.S. 505, 519, 83 S.Ct. 358, 367 (1963).[5] Thus, the complaining party must allege and prove that there were two sales made by the same seller to at least two different purchasers. *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 45, 68 S.Ct. 822, 827-828 (1948). See also *Chicago Sugar Co. v. American Sugar Refining Co.*, 7 Cir., 1949, 176 F.2d 1, 7; *Jones v. Metzger Dairies, Inc.*, supra, citing *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 67 S.Ct. 1015 (1947); *Massachusetts Brew. Ass'n v. P. Ballantine & Sons Co.*, D.Mass., 1955, 129 F.Supp. 736, 739. The prevailing view is that " 'Purchasers' within the meaning of Section 2(a) does not necessarily mean purchasers buying direct from the seller charged with discrimination." Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act*, p. 37 (2d rev. ed.

[5] See also *Hartley & Parker, Inc. v. Florida Beverage Corporation*, 5 Cir., 1962, 307 F.2d 916, 921; *Jones v. Metzer Dairies, Inc.*, 5 Cir., 1964, 334 F.2d 919, 924; *Purolator Products, Inc. v. F.T.C.*, 7 Cir., 1965, 352 F.2d 874, 883; *American News Company v. F.T.C.*, 2 Cir., 1962, 300 F.2d 104, 109; *Shreveport Macaroni Manufacturing Company v. F.T.C.*, 5 Cir., 1963, 321 F.2d 404, 408. See generally Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act* (2d rev. ed. 1959); Austern, *Presumption and Percipience about Competitive Effect under Section 2 of the Clayton Act* (1964); Kronstein, Miller and Dommer, *Major American Antitrust Laws* Ch. 6 (1965); Patman, *Complete Guide to the Robinson-Patman Act* (1963); Seidman, *Price Discrimination Cases*, in Hoffman and Winard (eds.) 2 Hoffman, *Antitrust Law and Techniques*, p. 409 (1963).

1959). See also *Skinner v. United States Steel Corporation*, 5 Cir., 1956, 233 F.2d 762; *American News Company v. F.T.C.*, 2 Cir., 1962, 300 F.2d 104, 109, and cases cited therein; *Tri-Valley Packing Association v. F.T.C.*, 9 Cir., 1964, 329 F.2d 694, 709; *Purolator Products, Inc. v. F.T.C.*, 7 Cir., 1965, 352 F.2d 874, 883; *Elizabeth Arden, Inc. v. Federal Trade Commission*, 2 Cir., 1946, 156 F.2d 132; Rowe, *Price Discrimination Under the Robinson-Patman Act* §4.5, pp. 57-59 (1962); Stickells, *Legal Control of Business Practice* § 119 (1965). As the Seventh Circuit has stated:

> "If a seller can control the terms upon which a buyer once removed may purchase the seller's product from the seller's immediate buyer, the buyer once removed is for all practical, economic purposes dealing directly with the seller. *If the seller controls the sale, he is responsible for the discrimination in the sale price, if there is such discrimination. If the seller cannot in some manner control the sale between his immediate buyer and a buyer once removed, the he has no power by his own action to prevent an injury to competition.*" (Emphasis added.)

Purolator Products, Inc. v. F.T.C., 7 Cir., 1965, 352 F.2d 874, 883. See also *American News Company v. F.T.C.*, supra, and cases cited therein; *Tri-Valley Packing Association v. F.T.C.*, supra; *Skinner v. United States Steel Corporation*, supra; Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act*, p. 37 (2d rev. ed. 1959). Cf. *Massachusetts Brew. Assn v. P. Ballantine & Sons Co.*, D.Mass., 1955, 129 F.Supp. 736, 739. The thrust of this so-called "indirect purchaser" doctrine is

that a manufacturer, by utilizing the subterfuge of a "dummy" wholesaler or distributor, should not be able to evade the price discrimination provisions of the Robinson-Patman Act. *American News Company v. F.T.C.*, supra at 109-110.

In the present case, however, the record fails to disclose that Hiram Walker ever sold products directly to the appellee, nor did it do so indirectly by controlling the price or terms of resale. In his deposition submitted on the motion for summary judgment, William G. Benjamin, Sr., president and sole stockholder of plaintiff, admitted that he did not know of a single instance in which Hiram Walker sold directly to any retailer. Furthermore, Binford H. Sykes, General Manager of South Florida, and Elliott Feinberg, President of Florida Beverage, stated in their depositions that prices were set entirely by their own companies and without consultation with Hiram Walker. There was no evidence to the contrary and the facts were undisputed. Under these circumstances, appellant Hiram Walker cannot be held liable as a seller within the meaning of the Robinson-Patman Act. *American News Company v. F.T.C.*, 2 Cir., 1962, 300 F.2d 104, 110; *Klein v. Lionel Corporation*, 3 Cir., 1956, 237 F.2d 13, 14-16; *Massachusetts Brew. Ass'n v. P. Ballantine & Sons Co.*, D.Mass., 1955, 129 F.Supp. 736, 739; *Purolator Products, Inc. v. F.T.C.*, 7 Cir., 1965, 352 F.2d 874, 883; *Skinner v. United States Steel Corporation*, 5 Cir., 1956, 233 F.2d 762, 764; *Rowe, Price Discrimination Under the Robinson-Patman Act* §4.4, p. 56 (1962); Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act*, p. 37 (2d rev. ed. 1959). Thus, considering the depositions and affidavits as a whole, there is " 'no genuine issue as to any material fact,' " and Hiram Walker " 'is entitled to a

judgment as a matter of law.'" *Keating v. Jones Development of Missouri, Inc.*, 5 Cir., 1968, 398 F.2d 1011, 1013, citing Fed.R.Civ.P.56(c). See also *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575 (1968); *National Labor Relations Board v. Smith Industries, Inc.*, 5 Cir., 1968, __ F.2d __ [No. 25691, Nov. 12]; *Sheets v. Burman*, 5 Cir., 1963, 322 F.2d 277. See generally 6 Moore, *Federal Practice* ¶56.16 (2d ed. 1965).

We next inquire whether the distributors South Florida and Florida Beverage, as the actual sellers, under the circumstances may be liable. However, in order to come within the provisions of the Robinson-Patman Act, the appellee must demonstrate that the discriminatory sales were "in commerce." 15 U.S.C. §13(a). In this regard,

> "The cases recognize a distinction between the commerce which is covered by the Sherman Act and that covered by the Robinson-Patman Act. 'In an action brought under the Robinson-Patman Act it is necessary to allege and prove that the transactions complained of are actually in interstate commerce, while in actions brought under the Sherman Anti-Trust Act it is sufficient if the transactions complained of are shown to have affected interstate commerce.' . . . *Accordingly, cases involving liabiliy under the Sherman Anti-Trust Act where it was sufficient to show that the sales affected interstate commerce are not applicable to our present case.*" (Emphasis added.)[6]

[6]Thus the District Courts' reliance on *United States v. South Florida Asphalt Company*, 5 Cir. 1964, 329 F.2d 860, was misplaced.

Willard Dairy Corp. v. National Dairy Products Corp., 6 Cir., 1962, 309 F.2d 943, 946. See *Burke v. Ford*, 389 U.S. 320, 88 S.Ct. 443 (1967) (per curiam); *Foremost Dairies, Inc. v. F.T.C.*, 5 Cir., 1965, 348 F.2d 674, 676; *Shreveport Macaroni Manufacturing Company v. F.T.C.*, 5 Cir., 1963, 321 F.2d 404, 408; *Jones v. Metzger Dairies, Inc.*, 5 Cir., 1964, 334 F.2d 919, 922 n. 3 (dicta); Rowe, *Price Discrimination Under the Robinson-Patman Act* § 4.9, p. 78 (1962), citing H. R. Rep. No. 2951, 74th Cong., 2d Sess. 6 (1936); Patman, *Complete Guide to the Robinson-Patman Act*, pp. 46-47 (1963). Thus, the Robinson-Patman Act is applicable only where the allegedly discriminatory transactions took place in interstate commerce.[7] That is, " . . . at least one of the two transactions which, when compared, generate a discrimination must cross a state line." Rowe, supra at 79.[8]

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[7]The fact that a firm manufactures products which are later sold to distributors in another state is not dispositive on the issue as to whether a subsequent sale to retailer is in interstate commerce. *Massachusetts Brew. Ass'n v. P. Ballantine & Sons Co.*, D. Mass., 1955, 129 F.Supp. 736, 738; *Food Basket, Inc. v. Albertson's Inc.*, 10 Cir., 1967, 383 F.2d 785, 787, and cases cited therein.

[8]See also *Borden Company v. F.T.C.*, 7 Cir., 1964, 339 F.2d 953, 955; *Cream Crest-Blanding Dairies, Inc. v. National Dairy Products Corp.*, 6 Cir., 1967, 370 F.2d 332 (per curiam), affirming 243 F.Supp. 331 (W.D. Mich., 1965); *Jones v. Metzger Dairies, Inc.*, 5 Cir., 1964, 334 F.2d 919; *Abramson v. Colonial Oil Company*, 5 Cir., 1968, 390 F.2d 873, 874, (per curiam); *Food Basket, Inc. v. Albertson's, Inc.*, 10 Cir., 1967, 383 F.2d 785, 787; *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 236-237, 71 S.Ct. 240, 243 (1951); *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 7 Cir., 1961, 287 F.2d 265, 267; *Baldwin Hills Bldg., Mat. Co. v. Fibreboard Paper Prod. Corp.*, C. D. Cal., 1968, 283, F.Supp. 202, 203; *Industrial Building Materials, Inc. v. Interchemical Corp.*, C. D. Cal. 1967, 278 F.Supp. 938, 973; *LaPointe v. Schweigert Meat Co.*, D. Minn., 1966, 282 F.Supp. 974, 976; *Massachusetts Brew. Ass'n v. Ballantine & Sons Co.*, D. Mass. 1955, 129 F.Supp. 736, 738. See generally Stickells, *Legal Control of Business Practices* § 117 (1965); Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act*, pp. 14-18 (2d rev. ed. 1959); Note, *Robinson-Patman Treatment of Interstate Firms Injured by Local Competitors*, 67 Yale L. J. 1073, 1074-1075 (1958).

The undisputed facts demonstrate that South Florida and Florida Beverage sold only to retail customers within the State of Florida. Under these circumstances, there is no merit to the contention that those sales, including sales to the appellee, were made in interstate commerce.

> "When the supplier himself does not engage in sales transactions across state lines — by deploying his franchised distributors or bona fide independent subsidiaries so that each satisfies only local market demands — Robinson-Patman liability may be minimized. *For any price differentials made by an autonomous local subsidiary or distributor solely as between customers within the state would arise from a sale on the part of the intrastate distributor or subsidiary rather than of the supplier, beyond the commerce criteria of the* [Robinson-Patman] *Act.*" (Emphasis added.)

Rowe, *Price Discrimination Under the Robinson-Patman Act*, p. 81 (1962). See also *Massachusetts Brew. Ass'n v. P. Ballintine & Sons Co.*, D. Mass., 1955, 129 F.Supp. 736, 739. Cf. *Shreveport Macaroni Manufacturing Company v. F.T.C.*, 5 Cir., 1963, 321 F.2d 404, 408-409. Thus, as a matter of law, the sales made by South Florida and Florida Beverage to the appellee and other retailers were not within the scope of the Robinson-Patman Act., and the District Court erred in denying summary judgment. Fed. R. Civ. P. 56(c); *Baldwin Hills Bldg. Mat. Co. v. Fibreboard Paper Prod. Corp.*, C.D. Cal., 1968, 283 F.Supp. 202, 205. See *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575 (1968); *Keating v. Jones Development of Missouri, Inc.*, 5 Cir., 1968, 398

F.2d 1011, 1013; *National Labor Relations Board v. Smith Industries, Inc.*, 5 Cir., 1968, __ F.2d __ [No. 25691, Nov. 12].

Reversed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 67-183-Civ.-EC

A & S TROPICAL, INC.,
a Florida corporation,

Plaintiff,

-vs-

SCHENLEY DISTILLERS CO.,
a Delaware corporation, et al.,

Defendants.

ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE was heard on the Motions for Summary Judgment of defendants, SOUTH FLORIDA LIQUOR DISTRIBUTORS, INC. and HIRAM WALKER INCORPORATED, as to Count One of the Complaint and upon the plaintiff's response thereto, as follows:

1. Both defendants contend that the sales of which plaintiff complains were not sales in interstate commerce within the requirements of the Robinson-Patman Act. The plaintiff argues, and it appears not to be controverted, that all or practically all of the allegedly discriminatory sales were of distilled spirits initially produced outside Florida by distillers, including defendant, HIRAM WALKER INCORPORATED, and sold by such distillers

in interstate commerce to distributors inside Florida, including defendant, SOUTH FLORIDA LIQUOR DISTRIBUTORS, INC. (All of the other defendants named in the complaint have either not been served or have heretofore been dismissed on motion, except for the defendant, FLORIDA BEVERAGE CORPORATION. Counsel for FLORIDA BEVERAGE CORPORATION states that it intends to file a motion raising the same arguments made by defendants, SOUTH FLORIDA DISTRIBUTORS, INC. and HIRAM WALKER INCORPORATED, dealt with in this Order, and also certain additional arguments raised by other defendants.) The products are in turn resold by such distributors, including SOUTH FLORIDA LIQUOR DISTRIBUTORS, INC., to the plaintiff and to the retail trade generally in Florida, and upon such resale the products in question are delivered from the respective distributors' warehouses in Florida to such retailers, all of whom are also located in the State of Florida. The plaintiff complains of quantity discounts in sales by such distributors to certain retail outlets with which the plaintiff competes.

There is evidence that most national distillers, including HIRAM WALKER, advertise their branded products throughout the nation and in Florida and engage in a limited amount of promotional activity at the retail level by so-called "missionary men," who are not salesmen but who may from time to time provide retail establishments with a limited amount of point-of-sale advertising material and otherwise promote the sale of products produced by the companies which these men represent.

2. In addition, defendant, HIRAM WALKER INCORPORATED, has argued that, even if the sales made by distributors to the plaintiff and to other retail outlets

with which the plaintiff competes are sales in interstate commerce, and therefore subject to the prohibitions of the Robinson-Patman Act, HIRAM WALKER cannot be held liable for violating the Robinson-Patman Act because the plaintiff has admitted that it does not purchase and has never purchased any product from HIRAM WALKER and has never itself dealt with any representative of HIRAM WALKER.

Plaintiff and all of the remaining defendants have stipulated that Count Two of the complaint should be dismissed without prejudice.

The Court having heard counsel for the plaintiff and for the moving defendants, and being fully advised, it is

ORDERED, ADJUDGED AND DECREED:

That Count Two of the complaint is hereby dismissed without prejudice.

That the Motions for Summary Judgment of defendants, SOUTH FLORIDA LIQUOR DISTRIBUTORS, INC. and HIRAM WALKER INCORPORATED, be denied on the ground that under the facts of record and under the controlling authority of *United States* v. *South Florida Asphalt Co.*, 329 F.2d 860 (5th Cir. 1964), the sales by distributors to retail entities, including the plaintiff, complained of in this action, are sales in interstate commerce within the meaning of the Robinson-Patman Act.

That the Motion for Summary Judgment of defendant, HIRAM WALKER INCORPORATED, to the extent that such motion is based upon the further ground that

plaintiff does not and has never purchased alcoholic beverages from HIRAM WALKER and has never dealt with any representative of HIRAM WALKER, be denied under the controlling authority of *United States* v. *South Florida Asphalt Co.*, 329 F.2d 860 (5th Cir. 1964).

This Court is of the opinion that this Order involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this Order as authorized by 28 U.S.C. §1292(b) may materially advance the ultimate termination of this litigation. It is ordered that all proceedings herein be stayed for ten days from date of entry of this order. If, within such ten days, any defendant shall apply to the United States Court of Appeals for the Fifth Circuit for permission to appeal from this order, the proceedings herein shall be stayed pending determination of such application or of the appeal, if it is allowed.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this ____ day of January, 1968.

SENIOR DISTRICT JUDGE